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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Mono)

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD STEVEN WATSON,

Defendant and Appellant.

C060221

(Super. Ct. No.
MFE073093)

Defendant Ronald Steven Watson entered pleas of guilty to two counts of arson on forest land (Pen. Code, §§ 451, subd. (c); unspecified section references that follow are to the Penal Code), one count of attempted arson on a structure (§ 455), and one misdemeanor charge of vandalism (§ 594, subd. (b)(2)(A)). He also admitted a prior conviction for assault with a firearm. (§ 245, subd. (a)(2).) The trial court sentenced defendant to an aggregate sentence of nine years. Specifically, the court imposed the lower term of two years for one of the arson counts, doubled that sentence for the prior strike, added a five-year

enhancement under section 667, subd. (a)(1), and ordered the sentences for the other offenses to run concurrently.

On appeal, defendant contends that the court abused its discretion in denying his *Romero* motion to strike the prior conviction. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) He also asserts that the five-year enhancement was unauthorized because the information did not specify that his prior offense was a serious felony. We affirm the judgment.

FACTS AND PROCEEDINGS

Defendant admitted setting several fires on the same afternoon in the Mammoth Lakes area. According to the probation report, when defendant was apprehended, he told officers that he was "trying to send smoke signals to contact friends who were late." In a subsequent interview, he said that he was being tracked by Argentinean drug lords and that people wanted to kill him. Defendant had a history of alcohol dependence and mental health problems, and he was in the middle of a divorce.

Defendant entered a negotiated plea of guilty to two counts of arson, one count of attempted arson of a structure, and one count of misdemeanor vandalism, and he admitted a prior conviction for assault with a firearm. The trial court subsequently denied his motion to strike this prior.

At sentencing, the court noted that a psychologist had determined that although defendant knew the nature and quality of his actions, he was "substantially mentally disordered at the time of these crimes." The court stated that while defendant

had committed a very serious offense, with the potential for significant loss of life and property, defendant did not act from an evil motivation; rather, he suffered from a "serious, serious mental disorder." The court concluded that defendant's "severe psychotic state, his severe mental disorder is a circumstance in mitigation that clearly outweighs any circumstances in aggravation."

The court therefore imposed the lower term of two years on one of the arson counts, doubled it for the prior felony conviction, and added an additional five-year enhancement under section 667, subdivision (a)(1), and ran the other sentences concurrently, for an aggregate sentence of nine years.

This appeal followed.

DISCUSSION

I

Romero Motion

Defendant contends that the trial court abused its discretion in denying his *Romero* motion to strike his prior conviction. We disagree.

The three strikes law "establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court "conclud[es] that an exception to the scheme should be made because, for articulable reasons which can stand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme.'" [Citation.]" (*People*

v. Carmony (2004) 33 Cal.4th 367, 377 (*Carmony*).) In making this determination, the court should consider "the nature and circumstances of the defendant's present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

"[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*Carmony, supra*, 33 Cal.4th at p. 375.) In the context of sentencing decisions, "a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.) Reversal for abuse of discretion is justified where the trial court was unaware of its discretion to strike a prior strike, or refused to do so at least in part for impermissible reasons. (*Id.* at p. 378.) But where the court, aware of its discretion, "'balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]." (*Ibid.*)

In his written motion, defendant argued that a sentence of an appropriate length could be imposed even if his prior was stricken. He emphasized that he suffered from a severe mental disorder and had acted out of a mistaken belief that he needed to protect himself. The People countered that defendant was a dangerous individual, as evidenced by the number of fires he set

and the prior for assault with a firearm. These circumstances, the People argued, demonstrated that this was not an extraordinary case that justified striking a prior.

The trial court denied defendant's *Romero* motion at a hearing on September 2, 2008. No transcript of that hearing is included in the record on appeal.

In asserting that the trial court abused its discretion in refusing to strike the prior, defendant relies on comments the court made at the sentencing hearing on September 16, 2008, in support of its decision to impose a mitigated sentence. The People likewise quote at length from this sentencing hearing as evidence that the court acted well within its discretion in refusing to strike defendant's prior conviction.

However, the September 16 sentencing hearing was not when the *Romero* motion was argued and decided. As noted, the court heard and ruled on that motion two weeks earlier, on September 2. The comments now quoted by defendant and the People did not pertain to whether defendant's prior conviction should be stricken, but to an entirely different sentencing issue, namely, whether a mitigated sentence should be imposed.

Defendant bears the burden of clearly demonstrating that the sentencing decision was irrational or arbitrary. (*Carmony, supra*, 33 Cal.4th at p. 376.) "Where the record is silent [citation] . . ., we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]." (*Id.* at p. 378.)

Here, the absence of any record is fatal. Defendant's reliance on comments made two weeks after the *Romero* hearing have no bearing on the court's exercise of discretion at that hearing. Because there is no record of what transpired at the *Romero* hearing, defendant cannot establish abuse of discretion, and his claim of error necessarily fails.

II

Validity of Enhancement

The information charged that defendant suffered a prior strike conviction for assault with a firearm (§ 245, subd. (a)(2)), and defendant admitted the truth of this allegation. In imposing sentence, the trial court doubled the base term for the prior strike and also imposed a five-year enhancement pursuant to section 667, subdivision (a)(1). Defendant asserts that because the information did not allege that this prior conviction was a serious felony, he did not knowingly and intelligently admit to suffering such a prior and the trial court therefore erred in imposing the five-year enhancement. There was no error.

Section 667, subdivision (a)(1) provides that "any person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately." Section 667, subdivision (a)(4) defines "serious felony" as any felony enumerated in section

1192.7, subdivision (c). Section 1192.7, subdivision (c)(31) lists assault with a firearm as a serious felony.

However, as the People recognize, the information did not include this allegation. While the current felony offenses were highlighted as serious felonies, the prior conviction allegation stated only that defendant suffered a "prior strike conviction" for assault with a firearm. The information did not specify that this prior qualified as a serious felony.

"Due process requires that an accused be advised of the specific charges against him so he may adequately prepare his defense and not be taken by surprise by evidence offered at trial. [Citations.] This means that except for lesser included offenses, an accused cannot be convicted of an offense of which he has not been charged, regardless of whether there was evidence at his trial to show he committed the offense. [Citation.] An exception exists if the accused expressly or impliedly consents or acquiesces in having the trier of fact consider a substituted, uncharged offense. [Citations.] The same rules apply to enhancement allegations." (*People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438.)

However, in order to challenge the adequacy of notice, a defendant must raise an objection in the trial court. (*People v. Equarte* (1986) 42 Cal.3d 456, 467; *People v. Bow* (1993) 13 Cal.App.4th 1551, 1555, 1559-1560.) The failure to do so results in forfeiture of the claim because it would be unfair to permit a claim of error on appeal when that matter could have

been corrected or avoided in the trial court. (See *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469.)

Here, defendant failed to raise any claim that he received inadequate notice of the charges against him. He did not demur to the complaint (see § 1012), nor did he file a petition for writ of habeas corpus asserting that he was not properly advised of the serious felony enhancement. Defendant is therefore precluded from challenging his sentence on appeal. (*People v. Equarte, supra*, 42 Cal.3d at p. 467; *People v. Bow, supra*, 13 Cal.App.4th at pp. 1559-1560.)

Defendant claims he could not have raised this claim because he was unaware that a five-year enhancement was even a possibility. The record clearly establishes otherwise.

First, we note that assault with a firearm is expressly delineated as a serious felony in section 1192.7, subdivision (c)(31). This case is therefore distinguishable from others in which a charged prior may or may not have qualified as a serious felony. (See, e.g., *People v. Haskin, supra*, 4 Cal.App.4th at pp. 1439-1440 [information that alleged prior burglary without specifying that the burglary was of an inhabited dwelling did not adequately charge a prior serious felony for purposes of section 667].)

Second, and more importantly, a five-year serious felony enhancement was discussed throughout these proceedings. Defendant's plea form, signed on June 6, 2008, noted that the maximum sentence was 25 years and specified the maximum sentence for each charged offense. The form outlined a "prior strike, PC

§1192.7(c)(1) [sic] + double," and expressly included a five-year sentence for the prior, as well as a notation that "4+4+2=10x2=20+5= 25." (Emphasis added.)

The probation report, filed July 9, 2008, recommended a four-year sentence on one of the arson charges (count 1), adding that this sentence "should be doubled for the admission to the strike prior enhancement, and an additional 5 years should be added since Count 1 is also a serious felony"

At the sentencing hearing, defense counsel argued that a mitigated sentence should be imposed because defendant would still be "taking a pretty good hit today," noting that the prior strike would double the base term and add five years, for a sentence of "four plus five."

In imposing sentence, the court reiterated that because the arson charged in count 1 was a serious felony, an additional five-year enhancement would be imposed, resulting in a total aggregate sentence of nine years. Defense counsel then added "for the record" that "the various sentences and times that are being imposed actually are set forth by the probation officer The five years is derived from . . . [s]ection 667(a)(1), doubling the base term is pursuant to 667(e)(1). That's how we get to the nine."

The potential for a five-year enhancement was apparent from the outset and discussed throughout the proceedings, but defendant did not challenge the adequacy of the charging documents through a demurrer or any other means. Under these circumstances, any claim of error was forfeited. (*People v.*

Equarte, supra, 42 Cal.3d at p. 467; *People v. Bow, supra*, 13 Cal.App.4th at pp. 1559-1560.)

DISPOSITION

The judgment is affirmed.

_____ HULL _____, J.

We concur:

_____ SIMS _____, Acting P. J.

_____ BUTZ _____, J.